



JCC:KPM
90-11-3-608A

U.S. Department of Justice

Environmental Enforcement Section
Environment and Natural Resources Division
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

Washington, D.C. 20530

June 4, 1993

VIA OVERNIGHT MAIL

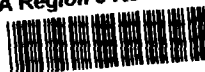
The Honorable James L. Foreman
Judge, United States District Court for the
Southern District of Illinois
750 East Missouri Avenue
East St. Louis, Illinois 62202

Re: United States v. NL Industries, Inc., et al.
Civ. Action No: 91-578-JLF
DOJ No: 90-11-3-608A

Dear Judge Foreman:

This letter is in response to your request that the United States provide the Court with a definitive response as to whether U.S. EPA is willing to reopen the administrative record for this Site to receive additional public comment on the appropriate cleanup level for lead in residential soils, and if so, whether the United States would consent to the Court's appointment of an expert panel which would evaluate the newly formed record for the Court. As explained below, U.S. EPA remains willing to reopen the administrative record to permit additional public comment on the appropriate cleanup level for lead in residential soils. However, since the offer was originally extended, the Defendants have sought to structure the contemplated public comment process, through Court-appointed experts, in a fashion that is inconsistent with the role of this Court. Providing (1) that the Court declines the Defendants' request that the Court appoint experts to provide comments to U.S. EPA; (2) the Court defers a decision on whether any expert panel is needed to evaluate the administrative record until after the close of the proposed public comment period; and (3) that the Defendants agree that a reopening of the record on this basis is acceptable to them and will be useful in attempting to resolve remedy-related issues in

EPA Region 5 Records Ctr.



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this case, then U.S. EPA's offer to reopen the administrative record stands.

First, concerning the Defendants' latest proposal to have this Court appoint an expert "advisory panel," we stand by our earlier objection to the appointment of such a panel at this time. In their representations to this Court at the May 19, 1993 Status Conference and in their correspondence with the Court prior to that conference, the Defendants have repeatedly asked for judicial intervention into U.S. EPA's administrative process based on an unsupported claim of Agency bias. According to their May 26, 1993 letter to the Court, the Defendants have apparently retreated from their initial position.¹ They now propose that the Court appoint the Defendants' experts who would simply report to the Court and function as "advisors." The United States believes the appointment of an "advisory panel" for any purpose is premature and unnecessarily involves this Court in overseeing U.S. EPA's administrative process.²

Second, as long as it is clear that Court-appointed experts will not be participating in the administrative process, U.S. EPA is willing to reopen the administrative record to receive additional public comment on the appropriate clean up level for residential soils, if within thirty (30) days, Defendants advise this Court and the United States that Defendants would support such reopening of the record. As the United States informed this Court at the Status Conference in this case on May 19, 1993, we believe that as a legal matter, U.S. EPA is not obligated to reopen the record in this case since, in our view, the evidence shows that in compiling the administrative record in this case, U.S. EPA fully complied with the requirements of the

¹During the status hearing, the Defendants maintained that court-appointed experts would submit comments to U.S. EPA during the public comment period. In our view, such a proposal would fundamentally alter the role of the Court envisioned by Congress under CERCLA, and it would inappropriately inject the Court in the midst of the administrative decision-making process that the Court would eventually be called upon to review.


²In their May 26, 1993 letter, Defendants parenthetically refer to their proposal as a "motion." Due to the pendency of the United States' Motion For A Ruling On The Appropriate Scope and Standard of Review of Agency Action And For A Protective Order Limiting The Scope of Discovery ("Motion"), which was filed on May 9, 1992, the United States believes Defendants' "motion" is premature. If the Court is inclined to consider Defendants' "motion" at this time, the United States respectfully requests that it be given the opportunity to respond formally to Defendants' motion.


Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. and U.S. EPA's remedy is completely supported by that record. Notwithstanding this position and the considerable commitment of resources its offer will require and without waiving any of its claims in this case, the United States is willing to take the unprecedented step of reopening the administrative record for this Site to receive additional public comments on the appropriate cleanup level for lead in residential soils. At Defendants' request, U.S. EPA would time its reopening of the record to allow for Defendants and the public to submit to U.S. EPA the Illinois Department of Public Health's blood lead study, which Defendants in their March 16, 1993 letter to the Court stated would "be released in the next few weeks."³

It is our hope that the United States' proposal to reopen the record will be accepted by Defendants. We, therefore, await their response to this proposal.

Sincerely,

Assistant Attorney General
Environment & Natural Resources Division


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Steven M. Siegel
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U.S. EPA, Region V

cc: All Counsel of Record

³U.S. EPA would cleanup the most-severely contaminated properties during the proposed public comment period.

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OFFICE OF REGIONAL COUNSEL